IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ILENE HARPER,	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CAUSE NO. 4:16-CV-01678**
	§	
	§	
FORT BEND INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Defendant.	§	**JURY DEMANDED**

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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TO THE HONORABLE U.S. DISTRICT JUDGE:

NOW COMES, Ilene Harper, Plaintiff in the above-styled and numbered cause and files this, her response to Defendant's Motion for Summary Judgment respectfully requesting the Court to deny Defendant's motion. In support of her request, Plaintiff will show to the Court as follows:

I.
NATURE OF THE CASE AND STAGE OF PROCEEDING

This is an employment discrimination and FMLA retaliation case arising out of Plaintiff's employment with Fort Bend Independent School District. On May 16, 2016, Plaintiff filed her Original Petition in Fort Bend County District Court alleging claims of discrimination based on race and disability under Chapter 21 of the Texas Labor Code, retaliation under Chapter 21 of the Texas Labor Code, and claims of interference and retaliation under the Family Medical Leave Act (FMLA). *See* Dkt. 1-1.

After filing its Answer and Affirmative Defenses, Defendant removed this case to federal court based on federal question jurisdiction on June 13, 2016. On June 20, 2016, Defendant filed a partial motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction over Plaintiff's Chapter 21 claims. On August 16, 2016, the Court dismissed Plaintiff's Chapter 21 retaliation claim for lack of jurisdiction. *See* Dkt. No. 15. Plaintiff now submits her response to Defendant's Motion for Summary Judgment requesting the Court to deny Defendant's motion for the reasons set forth below.

II.
ISSUES TO BE RULED ON BY THE COURT

The issues to be decided by the Honorable Court include the following:

(1) Whether Plaintiff meets her *prima facie* case of race discrimination under Chapter 21 of the Texas Labor Code;

(2) Whether Plaintiff meets her *prima facie* case of discrimination based on a disability as it relates to the District's decision to ultimately terminate her employment;

(3) Whether Plaintiff can establish that FBISD retaliated against her for exercising her rights under the FMLA.

(4) Whether Plaintiff can establish that FBISD's proffered legitimate, nondiscriminatory reasons for termination are mere pretext for disability discrimination;

Summary judgment is appropriate when the pleadings, affidavits, and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, all evidence and reasonable inferences must be viewed in the light most favorable to the non-movant. *U. S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

In summary, resolving the movant's motion hinges on whether Defendant establishes "no genuine issue as to any material fact." FED. R. CIV. P. 56(c). In *Reeves*, the Supreme Court articulated the following six principles for courts to follow in making this determination: 1) Courts must review the summary judgment record "taken as a whole;" 2) Courts "must draw all reasonable inferences in favor of the nonmoving party;" 3) Courts "may not make credibility determinations or weigh the evidence;" 4) Courts must disregard all evidence favorable to the movant that the jury is not required to believe; 5) Courts should give credence to the evidence favoring the non-movant; 6) courts may give credence to the evidence favorable to the movant only to the extent that it is "uncontradicted and impeached," at least to the extent that it comes from "disinterested witnesses." *Reeves,* 530 U.S. at 151.

Defendant's motion ignores these principles. Instead, the motion amounts to nothing more than Defendant's unsupported spin on the facts, which is inappropriate in a summary judgment context and should not displace the above-referenced principles mandated by the U.S.

Supreme Court.

III.
SUMMARY OF THE ARGUMENTS

Defendant's Motion for Summary Judgment should be denied. Plaintiff is able to show that she meets her *prima facie* case of race and disability discrimination. Plaintiff is able to establish that FBISD retaliated against her for exercising her rights under the FMLA. Moreover, Plaintiff can establish that Defendant's proffered "legitimate, non discriminatory" reasons for her termination were mere pretext.

IV.
FACTUAL SUMMARY

Plaintiff, an education professional with 22 years of experience, began working for Defendant in November of 2007. Her initial position was that of Assistant Director of Student Support Services and Cultural Diversity. Throughout her tenure, Plaintiff received numerous awards and accolades, including recognition for a district wide character education initiative that resulted in the Defendant being the only school district in Texas to be named a National School District of Character. ***See* Harper Affidavit, attached as Exhibit A ["Ex. A"], at ¶ 3.** In addition, Plaintiff was also selected to present a briefing on school discipline in Washington D.C. where she shared Defendant's successful implementation of various positive behavioral support programs. ***Id.***

In May of 2014, Plaintiff was notified that her department was being dissolved. While Plaintiff was informed that she would now be the Assistant Director of Defendant's At Risk Department, all but one of the programs which Plaintiff had created and cultivated into successful programs were taken away from Plaintiff and given to White Assistant Directors. ***See* Harper Deposition, attached as Exhibit B ["Ex. B"], 11:5-24, 92:2-18; *see also* Ex. A, at ¶ 4.**

On or about January 6, 2015, Plaintiff had a meeting with her direct supervisor, Director of Defendant's At Risk Department, Michael Ewing, during which she notified him of an upcoming potential surgery for an ADA-qualifying condition from which Plaintiff had been suffering for more than a year. ***See*** **Ex. B, 15:6-13, 20:4-25, 23:4-22; 20:25-21:6, 98:17-99:6.**

Afterward, on or about February 9, 2015, Plaintiff was informed by the Executive Director of Federal Programs, Dr. Lupita Garcia, that her position as Assistant Director of Defendant's At Risk Department was being eliminated. Rather than working as the Assistant Director of Defendant's At-Risk Department, Plaintiff was told that her position was being demoted down to a Coordinator position within Defendant's At Risk Department. ***See*** **Ex. B, 16:3-12, 52:15-17,**

When Plaintiff discovered that two other White Coordinators had been recently promoted to Assistant Directors, Plaintiff believed that her demotion from Assistant Director to Coordinator was a result of discriminatory animus based on race. ***See*** **Ex. B, 19:17-20:3, 42:6-11, 89:15-90:3.** Plaintiff's belief was further validated by the fact that she was the only African American holding an Assistant Director position at Defendant's central office[1] and the only Assistant Director being demoted. ***See*** **Ex. B, 42:15-25, 89:15-90:3.** Lastly, based on her superior qualifications and experience, Plaintiff did not understand why she had not been offered one of the Assistant Director positions that had recently been awarded to White Coordinators with no Assistant Director experience. ***See*** **Ex. A, at ¶ 19.**

In response to Plaintiff's request for more information on the demotion to the

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[1] Defendant's argument that Plaintiff was not the only African American in the central office is disingenuous at best. *See* Def.'s Ex. E at ¶8. First, Defendant's own exhibit states that Ms. Crystal Mills' effective start date was July 1, 2015. *See* Def.'s Ex. E-5, p.1 & p.5. By July 1, 2015, Plaintiff had already been terminated. As such, Plaintiff is accurate in stating that she was the only African American at the central office during the relevant timeframe. Additionally, Defendant's Organization chart clearly indicates that Ms. Mills was not within Dr. Garcia's chain of supervision, unlike Plaintiff's comparators. **Ex. K, Defendant's Organization Chart for Federal and Special Programs 2015-2016 (Bates No. FBISD 465).**

Coordinator position, a meeting was held with Director of Compensation, Sheron Blaylock, and Dr. Garcia, on or about February 27, 2015. At the meeting, Plaintiff was told that she had three days to decide whether she would accept the Coordinator position within Defendant's At Risk Department rather than the Assistant Director position she currently held at the time. ***See* Ex. B, 30:4-10.**

When Plaintiff asked about the change in pay from the Assistant Director position down to the Coordinator position, Dr. Garcia said only that her pay would stay the same for the remainder of the school year but that her salary would be reviewed and "adjusted accordingly" for the following year. ***See* Ex. A, at ¶ 17.** Despite asking Dr. Garcia for further clarification on the pay and duties associated with the downgrade in position, it was not until a subsequent meeting on March 4, 2015, with Defendant's Chief Human Resources Officer, Kermit Spears, that Plaintiff discovered the Coordinator position would result in a nearly $11,000.00 per year reduction in Plaintiff's pay the following year. ***See* Ex. B, 38:3-6, 40:12-18.**

On March 23, 2015, Plaintiff filed an internal grievance wherein she complained about racially discriminatory practices including the demotion (in light of her comparators) and reduction in pay. ***See* Ex. B, 42:2-25, 49:10-20.**

With regards to Plaintiff's disability and FMLA complaints, on the day that she returned from FMLA, she found her office had been turned into a storage room. ***See* Ex. B, 55:17-56:6; *see also* Ex. C.** Moreover due to the large number of boxes being improperly stored in her office, Plaintiff was unable to perform some of her job duties since her recent surgery prevented her from being able to move the larger boxes. ***See* Ex. B, 56:13-22.** Furthermore, upon her return from FMLA, Plaintiff was not allowed to work with her colleagues on assignments relating to summer school work (as had always been the case in the past). ***Id.*** Instead, Plaintiff was relegated to menial clerical work. ***See* Ex. A, ¶ 27; *see also* Ex. B, 55:17-56:6.** Plaintiff felt this was further discrimination and in retaliation for her having exercised her rights under the FMLA.

On June 9, 2015, within one day of returning from her FMLA leave, Plaintiff was informed by Mr. Spears that since she had not accepted the Coordinator position, Plaintiff's last day of employment would be June 30, 2015. ***See* Ex. B, 53:3-54:1, 77:4-12**; ***see also* Ex. D, FBISD Notice of Termination Effective June 30, 2015 (Bates No. FBISD 002).** Plaintiff had never been notified that she was facing termination if she did not accept the demotion and, based on her experience, had no reason to expect a termination since she had routinely seen other experienced educators transferred into other positions when faced with reorganization. ***See* Ex. A, ¶ 23; s*ee also* Ex. B, 53:3-54:16, 38:14-39:2, 43:7-22.**

Lastly, after Plaintiff's termination, Plaintiff discovered that Defendant could have maintained her pay at the same level as it had been when she was an Assistant Director even in the Coordinator position. As stated above, despite Defendant telling Plaintiff that she would have to accept the demotion *and* a reduction in pay of $11,000 (down from $97,000 per year to $86,000 per year) in the new Coordinator position, documents that Defendant provided to the TWC during the benefits determination clearly contradict this position. According to the pay scale that Defendant provided to the TWC in August of 2015, the pay scale for the Coordinator position went as high as $99,930.00 and therefore, Defendant had no need to reduce her pay. ***See* Exhibit E, August 13, 2015, Letter to TWC from Bruce Drennan (Bates No. Harper - 0574); *see also* Exhibit F, FBISD Pay Scale submitted to TWC (Bates No. Harper 0576).** Interestingly, on June 20, 2015, Mr. Spears, the Chief Human Resources officer, signed an affidavit acknowledging that he informed Plaintiff that the salary for the Coordinator position was $86,000.00. ***See* Def.s Mot. Summ. J., Ex. D, ¶4**. Nonetheless, on August 2015, in support of their efforts to deny Plaintiff unemployment benefits, Defendant's HR Administrator misrepresented to the TWC that, "[b]cause [Plaintiff] never accepted the position, salary was never discussed with her." **Exhibit E, August 13, 2015, Letter to TWC from Bruce Drennan (Bates No. Harper -0574)**.

Ultimately, Defendant's decision to demote and cut Plaintiff's pay – while simultaneously promoting other White employees into Assistant Director positions was based on discriminatory animus on the basis of race. Likewise, Defendant's decision to terminate her was on the basis of her race and disability, and also in retaliation for Plaintiff having exercised her rights under the FMLA.

V.
ARGUMENTS AND AUTHORITIES

A. DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE PLAINTIFF HAS ESTABLISHED HER PRIMA FACIE CASE FOR DISPARATE TREATMENT BASED ON RACE UNDER CHAPTER 21.

Because the Texas Commission on Human Rights Act ("TCHRA") was modeled after Title VII, Texas courts generally look to federal precedent for guidance in determining the proper interpretation of the statute. *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001).

The Texas Labor Code provides that "an employer commits an unlawful employment practice if because of race . . . the employer . . . discharges an individual, or discriminates in any other manner against an individual in connection with the compensation or the terms, conditions, or privileges of employment . . ." Tex. Lab. Code Ann. at § 21.051 (West 1993).

Under this section, an employee may bring suit against an employer through one of two theories of liability: disparate treatment or disparate impact. *Agoh v. Hyatt Corp.*, 992 F. Supp.

2d 722, 731 (S.D. Tex. 2014). In a disparate treatment case, intentional discrimination may be proven through direct or circumstantial evidence. *Id.* at 732. In the context of Title VII of the Civil Rights Act of 1964, direct evidence includes any statement or written document showing a discriminatory motive on its face. *Id.* In such a case, the burden shifts to the employer to establish that it would have made the same decision regardless of the discriminatory factor. *Id.* at 733.

On the other hand, an employee relying on circumstantial evidence to prove intentional discrimination must first establish a *prima facie* case of discrimination through the application of the *McDonnell Douglas* framework. *Id.* at 734 (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). In doing so, the employee must demonstrate that (1) s/he belonged to a protected category; (2) that s/he was qualified for the position; (3) that s/he was subjected to an adverse employment action; and (4) that s/he was replaced by someone outside his/her protected class or show that other similarly situated employees outside of the protected class were treated more favorably. *Id.*

This *prima facie* case is not an onerous standard. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Rather, the requirements in establishing a *prima facie* case "can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Massaro v. United States*, 538 U.S. 500, 507 (2003). In fact, a Plaintiff's *prima facie* case only serves to raise an inference of discrimination. *See Texas Dept. of Community Affairs*, 450 U.S. at 253–54 (noting "as the Court explained in *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978), the *prima facie* case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'").

For the purposes of their Motion, Defendant does not dispute that Plaintiff can establish the first three *prima facie* elements of her race discrimination claim. As such, Plaintiff will focus on the last remaining element - that s/he was replaced by someone outside of her protected class **or** show that other similarly situated employees outside of her protected class were treated more favorably.

On this point, Defendant first attempts to frame Plaintiffs complaint as a "true replacement" case, stating that since another African-American was hired into the Coordinator position, Plaintiff cannot establish a *prima facie* case. Despite obvious differences in the positions and their relevant duties, Defendant argues that the Plaintiff's position as Assistant Director of At-Risk and Ms. DeAndria Brigham's (African American) position as Coordinator of At-Risk were sufficiently similar to qualify this as a "true replacement" case. However, as the record shows, Plaintiff never held the position of Coordinator and Ms. Brigham was not hired for an Assistant Director position. ***See* Ex. B, 96:19-97:3.** Additionally, while Defendant acknowledges the difference in position titles, it simultaneously argues that the similarity of the jobs is sufficient to qualify this as a "true replacement" case. However, Defendant's own records belie such a position. According to Defendant's "Office of At -Risk Programs Organization Chart," Plaintiff's duties as the Assistant Director are listed as, "Oversight of 504, CHAMPS and FOUNDATIONS, PEP, and summer school." ***See* Ex. G, Office of At Risk Programs organization chart (Bates No. FBISD 1190).** By contrast, the duties for the Coordinator position in the same Office were listed as, "Oversight of Rt, At-Risk Coding and Drop Out Prevention, caseworkers." *Id.* Therefore, even Defendant's own organizational documents recognize the difference in the position held by Ms. Harper and the Coordinator position within the At-Risk Department.

In a Fifth Circuit case, the Court found that similar facts presented a "reduction in force" case rather than a "replacement case." *See Meinecke v. H & R Block of Houston*, 66 F.3d 77, 84 (5th Cir. 1995). In *Meinecke,* the Court decided that the facts presented a "reduction in force" case rather than a "replacement case" where the employer closed a headquarters office where employee worked and, as in the present case, abolished her position as part of a reorganization plan and employee's managerial role was obviated by same. *Id.* In a "reduction in force" case, the Court explained, Plaintiff must prove as the fourth element of her claim of discrimination that those outside of her class remained in positions similar to the position she held before the termination despite the reorganization. *Id.* at 84.

In the present case, Defendant has acknowledged that during the 2014-2015 school year, the same year that Plaintiff was "offered" a demotion to Coordinator and reduction in pay, four Coordinators in the same central office in which Plaintiff worked were promoted to Assistant Directors. **Ex. H, Def.'s Obj. and Resp. to Plt.'s First Set of Interrogatories, No. 2 and No. 3.** More importantly, all four Coordinators were White. *Id.* Also critically supportive of Plaintiff's claims is Defendant's admission that in the three preceding years, no other Assistant Director at Defendant's central office had been demoted or otherwise transferred into a Coordinator position. *Id* Additionally, Plaintiff was never even given the option to even apply for the other Assistant Director positions that became available since, at least two of them, were never posted. **Ex. B, 19:17-20:3.** Instead, despite the fact that one of the former Coordinators, Ms. Amanda Hartley (White), had no experience as an Assistant Director prior to the 2014-2015 school year (as compared to Plaintiff's eight years working as an Assistant Director), Defendant promoted Ms. Hartley to an Assistant Director position. ***See* Ex. I, Dec. 17, 2014, Email Regarding Reclassification of Hartley (Bates No. FBISD 2007).** As further evidence of disparate treatment, not only was one of Plaintiff's programs, the Pregnancy Education Program ("PEP"), given to Ms. Hartley, but FBISD also elected to pay Ms. Hartley, a less experienced Assistant Director, an annual base salary of $90,126.96 for the 2015-2016 school year, while attempting to force Plaintiff to accept a reduction in pay for the same year that would have resulted in Plaintiff receiving an $11,000.00 reduction in pay for an annual salary of $86,000.00. ***See* Ex. B., 69:9-19**; *see also* **Ex. J, Hartley 2015-2016 Notice of Salary for 2015-2016 (Bates No. FBISD 1892)**.

Lastly, with regard to the White Coordinators working in the central office identified by Defendant as having been promoted during the 2014-2015 school year, Plaintiff's deposition testimony identifies Dr. Garcia, as having played a key role in their promotions and Plaintiff's simultaneous discriminatory demotion that Defendant attempted to force upon her. **Ex. B, 100:3-101:1.** Specifically, Plaintiff identified Ms. Hartley (White), Ms. Michelle LeBleu (White), and Ms. Nicole Roberts (White) as three of the four Coordinators that were promoted to Assistant Directors.[2] ***Id.*** More importantly, as the Executive Director, Dr. Garcia had oversight over all three employees including Plaintiff. ***Id.*** Plaintiff's assertion is supported by Defendant's Organization Chart for Federal and Special Programs which shows Dr. Garcia was over the At-Risk office where Plaintiff worked, was over the Special Programs office where Ms. Hartley worked, and was also over the Special Education office where Ms. LeBleu and Ms. Roberts worked. **Ex. K, Defendant's Organization Chart for Federal and Special Programs 2015-2016 (Bates No. FBISD 465).** In opposition to Plaintiff's position that Dr. Garcia played a role in the disparate treatment, Defendant attempts to characterize the decision that identified Plaintiff's position for demotion and reduction in pay as one made by her immediate supervisor,

[2] The fourth Coordinator, Zachary Bigner (White) was promoted to Assistant Director of Accountability in 2014-2015 and, while working in the central office, was not in Dr. Garcia's chain of supervision.

Mr. Michael Ewing. *See* **Def.'s Mtn. Summ. J., pg. 2 ¶2 – pg. 3 ¶1; *see also* Ex. C to Def.'s Mtn. Summ. J., ¶5, ¶7.** Because Mr. Ewing is African American, it is clear that Defendant's unfounded argument is merely an effort to redirect the focus away from Dr. Garcia in order to undermine Plaintiff's claims of race discrimination. However, during the March 4, 2014 meeting that Plaintiff had with Defendant's Chief HR Officer, Mr. Kermit Spears, Plaintiff was informed that at the time that Mr. Ewing conducted her Jan. 27, 2015 Mid-Year review, Mr. Ewing was not in "the know" about the change in Plaintiff's position, and "didn't know what was happening organizationally." ***See* Ex. A, at ¶ 21; *see also* March 4, 2014 Audio Recording at 31:20 (Bates No. Harper 0140 – available upon request); *see also* Jan. 27, 2015 Mid Year Review (Bates No. FBISD 0407).**

Because the record is clear that Dr. Garcia presented the proposed position changes in December of 2014, as confirmed by her own affidavit, it is clear that Dr. Garcia was the one that targeted Plaintiff. *See* Exhibit B to Def.'s Mtn. Summ. J., ¶ 14.

Although Defendant argues that Plaintiff's comparators are not sufficiently "similarly situated" to Plaintiff for them to qualify as comparators for Plaintiff's race discrimination claim, such argument rings hollow. As the Fifth Circuit has made clear, "nearly identical" does not mean "identical." In discussing this point, the Fifth Circuit clarified:

> "Applied to the broader circumstances of a plaintiff's employment and that of his proffered comparator, a requirement of complete or total identity rather than near identity would be essentially insurmountable, as it would only be in the rarest of circumstances that the situations of two employees would be totally identical. For example, it is sufficient that the ultimate decision maker as to employees' continued employment is the same individual, even if the employees do not share an immediate supervisor."

Lee v. Kansas City Southern Railway, 574 F.3d 253, 260 (5th Cir. 2009) (internal citations omitted, emphasis added). In the present case, Plaintiff has shown that while she and the other Coordinators did not share an *immediate* supervisor, they were all subject to the same ultimate decision maker: Dr. Garcia who, as the Executive Director of Special Programs, oversaw all of the programs in which the White Coordinators worked, and indeed, spearheaded the effort to target Plaintiff. ***See* Ex. B to Def.'s Mtn. Summ. J., Affidavit of Dr. Lupita Garcia at ¶ 14 (confirming that she was the one that recommended the elimination of Plaintiff's position to the Superintendent's Executive Team on December 10, 2014).** As noted, Plaintiff's position is further supported by the recorded statements of Defendant's Chief HR Officer confirming that Mr. Ewing was not in "the know" about Plaintiff's position change as late as January 27, 2015.

In light of the facts, evidence and testimony presented, Plaintiff has raised an "inference" of discrimination and established the elements of her *prima facie* case sufficient to survive summary judgment. Specifically, Plaintiff has raised more than a scintilla of probative evidence to raise a genuine issue of material fact as to the elements of her race discrimination claim.[3] As such, Defendant's Motion should be denied.

B. DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE PLAINTIFF HAS ESTABLISHED HER *PRIMA FACIE* CASE OF DISABILITY DISCRIMINATION.

The Texas Labor Code protects employees from discrimination due to a disability. TEX. LAB. CODE ANN. at § 21.051. Similar to the Texas Labor Code referring to Title VII in interpreting its discrimination provisions, the Labor Code also refers to the American with Disabilities Act, as amended, to interpret its disability discrimination provision.

Under the American with Disabilities Act, as amended, Plaintiff carries the initial burden

[3] There is more than a scintilla of evidence when reasonable and fair-minded people would differ on their conclusions. *King Ranch, Inc.*, 118 S.W.3d at 751. The burden is not met if the evidence is so weak that it creates no more than "mere surmise or suspicion" of a fact. *Id.*

to establish a *prima facie* case of disability discrimination. *Garner v. Chevron Phillips Chem. Co.*, 834 F. Supp. 2d 528, 539–40 (S.D. Tex. 2011). An employee establishes a *prima facie* case of disability discrimination when the following four prongs are met: (1) s/he is disabled; (2) s/he is qualified for the position[4]; (3) s/he suffered an adverse employment action; and (4) s/he was replaced or treated less favorably than non-disabled employees. *Garner* at 540.

In regards to the first prong, an employee is considered to be "disabled" when s/he can establish that s/he has (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual"; (2) s/he has a "record of such [physical or mental] impairment"; or (3) s/he is regarded as having such [physical or mental] impairment. 42 U.S.C.A. at § 12102 (1)(A)–(C) (emphasis added). An individual may find coverage under one or more of these three prongs. 29 C.F.R. at § 1630.2 (g)(2).

Under the first prong, "substantially limits"' is not meant to be a demanding standard and is to be construed broadly in favor of expansive coverage. *See* 29 C.F.R. § 1630.2 (j)(1)(i). Furthermore, under the ADAAA, an impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). (Emphasis). An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. *Id.* "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment." 29 C.F.R. § 1630.2(j)(1)(iv). However, in making this assessment, the term "substantially limits" is to be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA. *Id.*

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[4] An employee is qualified for his/her position when s/he can show that with or without an accommodation, s/he can perform the essential functions of the job. 42 U.S.C.A. § 12111 (8) (West 2013).

In defining what qualifies as an impairment that “substantially limits” a major life activity for the purposes of the ADAAA, guidance provided by the EEOC instructs that when evaluating whether someone is ‘substantially limited’ the focus should not be on the ‘outcomes' the person can achieve, as ‘an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.’ ” *Molina v. DSI Renal, Inc.,* 840 F.Supp.2d 984, 995 (W.D.Tex.2012). Rather, when comparing a plaintiff's ability to perform the major life activity in question to the ability of the general population’s ability to perform the same activity, the courts may consider, among other things, “pain experienced when performing a major life activity.” *Molina,* 840 F.Supp.2d at 995.

In the present case, Plaintiff underwent surgery as a result of a bone deformity in her foot and was prevented from performing her work duties; resulting in a need to exercise her medical leave rights under the FMLA. As a result of her condition, Plaintiff was substantially limited in her ability to walk. ***See* Ex. B, 21:3-14.** Specifically, Plaintiff testified that that her foot condition was “causing a lot of pain;’ that she would wake up in her sleep due to throbbing pain; and that this pain was especially prominent during the days that she had to walk to different campuses. ***Id.*** Moreover, Plaintiff testified that she was limited in her ability to walk for over a year. ***See* Ex. B, 98:18-99:6.** Because “walking” is a major life activity, and because Plaintiff was substantially limited in this major life activity *for over a year*, during which, despite the pain she experienced, she continued to walk, Plaintiff can establish that she suffered from a disability. While Defendant makes light of Plaintiff having to wear flat shoes to mitigate the pain she experienced as a result of her disability, it is clear that the determination of whether an impairment substantially limits a major life activity is “to be made without regard to the ameliorative effects of mitigating measures such as ... reasonable accommodations ....“ *Gonzalez* *v. Texas Health & Human Servs. Comm'n*, No. 5:13-CV-183-DAE, 2014 WL 6606629, at *6 (W.D. Tex. Nov. 19, 2014) (citing 42 U.S.C.A. § 12102(4)(E)(i)). Furthermore, while Defendant attempts to characterize this as a case wherein Plaintiff's condition only restricted her from wearing a certain type of shoe, Plaintiff's testimony –that the pain would cause her to wake in the middle of the night –clearly illuminates the fact that her condition had nothing to do with her choice of shoe style. As such, the fact that Plaintiff found a means by which to endure the pain of her disability while continuing to work should not diminish her ability to find protection under the ADAAA.

Even assuming, *arguendo*, that Plaintiff did not suffer from a physical impairment that substantially limited one or more major life activities, Plaintiff is still able to avail herself of the protections under the ADAAA in that she can clearly establish that she was "regarded as" disabled. Under the ADAAA's "regarded as" prong, an employee is *not required* to show that she was regarded as having a physical impairment that substantially limited a major life activity.[5] "If an individual can show that [an] adverse employment decision was made by the employer because of [the] perception of [a] physical impairment, whether based on myth, fear, or stereotype, the 'regarded as' prong of being defined as disabled under the ADA is generally satisfied."[6] Here, Defendant had clear knowledge of Plaintiff's medical condition. In addition, Plaintiff had also notified Mr. Ewing that she would be requiring a second surgery in the near future. ***See* Ex. A, ¶ 9; *see also* Ex. B, 22:20-23:16.** The fact that Mr. Ewing was aware of the need for an additional surgery, coupled with the discriminatory animus displayed through Defendant's actions with regards to converting Plaintiff's office into a storage room, clearly

[5] *See* 42 U.S.C.A. at § 12102 (3)(A) (stating, "[employee] meets requirement if . . . individual establishes that s/he has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment, *whether or not the impairment limits or is perceived to limit a major life activity*.") (emphasis added).
[6] *Lizotte v. Dacotah Bank,* 677 F. Supp. 2d 1155 (D.N.D. 2010).

indicates discriminatory animus based on her disability status. When such facts are analyzed in conjunction with Defendant's decision to terminate Plaintiff --while simultaneously promoting other less experienced non-disabled employees, it becomes evident that the "regarded as" prong of the ADAAA has been satisfied.

With regards to Defendant's argument that Plaintiff notified the EEOC, through her intake questionnaire, that she was not disabled; this is simply red herring. As is clear from Plaintiff's June 22, 2015, EEOC Charge, she felt that she had suffered from disability discrimination (see box) and specifically described her discussion with Mr. Ewing wherein she discussed her medical condition and the possible need for upcoming surgery. **Ex. C, Plaintiff's June 22, 2015 EEOC Charge of Discrimination (Bates No. FBISD 955).** As the Court is aware, the purposes underlying the administrative-complaint requirement for claims of discrimination include giving the charged party notice of the claim, narrowing the issues for speedier and more effective adjudication and decision, and giving the administrative agency and the employer an opportunity to resolve the dispute. *Lopez v. Texas State Univ.,* 368 S.W.3d 695, 701 (Tex. App. 2012). In the present case, Plaintiff's charge satisfied the stated purpose regardless of any clerical error, confusion, or oversight that Plaintiff may have experienced in completing her supplemental EEOC Intake Questionnaire.

As for Plaintiff being treated less favorably than non-disabled employees, Plaintiff's position is that her *termination* occurred as a result of her disability –not that her position was "reorganized" due to her disability. As Plaintiff testified during her deposition, she was never informed that she faced imminent termination if she did not accept the demotion and reduction in pay. ***See* Ex. B, 53:3-54:16, 38:14-39:2, 43:7-22.** In essence, Plaintiff felt that her termination was due in part to having previously notified Mr. Ewing, in January of 2015, that she would require an additional second surgery for her other foot after the surgery scheduled for March 2015. ***See* Ex. A, ¶ 9; *see also* Ex. B, 22:20-23:16.** Plaintiff's claim is supported by the nature of the reception that she received upon her return from medical leave which clearly indicates discriminatory animus based on her disability. Specifically, during her absence from work, Defendant had decided to convert Plaintiff's office into a storage room. ***See* Ex. C, Photos Ilene Harper's Office June 8, 2015 (Bates No. Harper 0013).** Moreover and as previously stated, due to the large number of boxes being improperly stored in her office, Plaintiff was unable to perform some of her job duties since her recent surgery prevented her from being able to move the larger boxes. ***See* Ex. B, 56:13-22.**

As shown, Plaintiff has raised an "inference" of discrimination based on disability and established the elements of her *prima facie* case sufficient to survive summary judgment. Specifically, Plaintiff has raised more than a scintilla of probative evidence to raise a genuine issue of material fact as to the elements of her disability discrimination claim; as such, Defendant's Motion should be denied.

C. DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE PLAINTIFF HAS ESTABLISHED HER *PRIMA FACIE* CASE OF FMLA RETALIATION

The FMLA "protects employees from retaliation or discrimination for exercising their rights under the FMLA." *See Mauder v. Metro. Transit Auth. Of Harris County*, 446 F.3d 574, 580 (5th Cir. 2006). A *prima facie* case of retaliation under the FMLA requires that Plaintiff show that: (1) she was protected under the FMLA; (2) she suffered an adverse employment action or decision; and (3) that she was treated less favorably than an employee who did not request FMLA leave or the adverse employment action was made because she sought protection under the FMLA. *Id*. FBISD does not dispute that Plaintiff meets the first two elements of her *prima facie* claim, but challenges Plaintiff's ability to meet the third element.

As a threshold matter, Plaintiff has always claimed that she suffered retaliation as a result of requesting FMLA. The fact that discovery resulted in Defendant disclosing information indicating that, of all the Assistant Directors in question under Dr. Garcia, Plaintiff was the only Assistant Director that was being demoted, the only Assistant Director that was ultimately terminated, and the only Assistant Director under Dr. Garcia that had requested FMLA, does not foreclose her ability to support her FMLA retaliation claim by pointing out that she was treated less favorably than other similarly situated employees who did not request FMLA. **Ex. M, Def.'s Obj. and Resp. to Plt.'s First Set of Interrogatories, No. 4 (confirming that, unlike Plaintiff, none of the Assistant Directors who remained after the reorganization had exercised their FMLA rights in the preceding three years).**

While Defendant insists on characterizing Plaintiffs complaint as one about the elimination of the Assistant Director position or the reorganization, Plaintiff has always contended that her complaint was with regards to her *termination*. As Plaintiff testified in her deposition, she was never made aware that she was facing imminent termination if she did not accept the forced demotion and reduction in pay. ***See* Ex. B, 53:3-54:16, 38:14-39:2, 43:7-22.** Moreover, knowing that Defendant had promoted two other Coordinators who worked under Dr. Garcia to Assistant Director positions, Plaintiff felt she had no reason to think that she would be facing termination. As such, Plaintiff's argument is not that Defendant's reorganization of her position was in retaliation for her having exercised her FMLA rights; but rather, Plaintiff's complaint is that her *termination* was in retaliation for having exercising her FMLA rights. ***See* Dkt. 1-1 at p. 8 ¶ 9 ("Defendant's termination decision was not only based on**

discriminatory animus on the basis of race and disability, but also in retaliation for Plaintiff having complained of race discrimination and in retaliation for having exercised her rights under the FMLA.").

In support of its argument, Defendant relies heavily on the Mauder case, in which the Court held that an employer was not required to suspend an employee's termination pending his FMLA filing when the employee was already on notice of his potential termination before requesting FMLA leave. *See Mauder*, 446 F.3d at 584-585. However, Plaintiff in the present case was never on notice of a potential termination. In fact, the first document to make any mention of termination was the June 9, 2015 notice of termination that Plaintiff received within a day of returning from her FMLA leave. ***See* Ex. A, ¶ 24; *see also* Ex. D, FBISD Notice of Termination Effective June 30, 2015 (Bates No. FBISD 002).**

Additionally, as noted with Plaintiff's claims regarding disability discrimination, Defendant's decision to fill Plaintiff's office with boxes so that she could not perform her duties, *despite* knowing she was returning from FMLA, further bolsters Plaintiff's argument. In conjunction with this treatment, upon her return from FMLA, Plaintiff was not allowed to work with her colleagues on assignments relating to summer school work. ***See* Ex. B, 56:13-22.** Instead, Plaintiff was relegated to menial clerical work only to find out the following day, June 9, 2015, that she was to be terminated. ***See* Ex. A, ¶ 27; *see also* Ex. B, 55:17-56:6**

In light of these facts, Plaintiff has raised more than a scintilla of probative evidence to raise a genuine issue of material fact as to whether she was treated less favorably than other similarly situated employees who did not request FMLA leave *and* as to whether the adverse employment action –her termination –was made because she sought protection under the FMLA. On this basis, Plaintiff respectfully requests that Defendant's Motion be denied.

D. **DEFENDANT'S NUMEROUS MISREPRESENTATIONS AND INCONSISTENCIES INDICATE A PRETEXTUAL BASIS FOR PLAINTIFF'S TERMINATION**

A plaintiff may establish intentional discrimination by showing the employer's proffered explanation is "unworthy of credence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Id.* Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Id.*

Defendant's Motion should be denied because Defendant has presented numerous conflicting statements regarding the events leading up to Plaintiff's termination. As stated above, despite Defendant's Chief HR Officer telling Plaintiff that she would have to accept a reduction in pay down to $86,000 per year in the new Coordinator position, documents that Defendant provided to the TWC indicate that it could have paid Plaintiff as much as $99,930.00. ***See* Exhibit E, August 13, 2015, Letter to TWC from Bruce Drennan (Bates No. Harper -0574); *see also* Exhibit F, FBISD Pay Scale submitted to TWC (Bates No. Harper 0576).** Additionally, Defendant misrepresented other facts to TWC stating that, "Because she never accepted the position, salary was never discussed with her." ***Id.*** As Defendant's own exhibit demonstrates, this statement is flatly contradicted by Mr. Spears' affidavit. ***See* Def.s Mot. Summ. J., Ex. D, ¶4**

According to Mr. Spears' sworn affidavit, he states that he met with Ms. Harper on May 4, 2015 regarding the creation of the new At-Risk Coordinator position. ***See* Ex. D to Def.'s Mtn. Summ J., ¶ 4.** He goes on to state that at this May 4th meeting, he informed Plaintiff of the decreased salary associated with the position and, after not receiving a response from Plaintiff by the end of the day, Defendant posted the position on May 4. ***Id.*at ¶ *5.*** However, this is clearly a false statement as indicated by his *March* 4th email to Plaintiff, wherein he acknowledges discussing the Coordinator position with Plaintiff on March 4th; the day before she began her FMLA leave. ***See* Ex. N_, March 04, 2015 E-mail from Kermit Spears (Bates No. FBISD 1203).** Interestingly, even as late as his March 4th e-mail, Mr. Spears does not mention any possibility of termination in the absence of Plaintiff accepting the demotion to Coordinator. *Id.*

Lastly, the inconsistency behind Defendant's various statements regarding who knew what and when – indicate the employer's proffered explanation is "unworthy of credence." As stated, Defendant's Chief HR Officer, Kermit Spears, informed Plaintiff that on the date that Mr. Ewing had conducted her Mid-year Review, Jan. 27, 2015, Mr. Ewing was not in "the know" about the change in Plaintiff's position, and "didn't know what was happening organizationally." ***See* Ex. A, at ¶ 21; *see also* March 4, 2014 Audio Recording at 31:20 (Bates No. Harper 0140 – available upon request); *see also* Jan. 27, 2015 Mid Year Review (Bates No. FBISD 0407).** As such, the credibility of Defendant's assertions that Mr. Ewing was involved in eliminating Plaintiff's position is called into question and creates a question of material fact.

Because Plaintiff has shown sufficient facts that Defendant's alleged legitimate reasons for termination are nothing but pretextual because they are false, inconsistent, and contradictory or are otherwise unworthy of credence, Defendant's Motion should be denied.

CONCLUSION

When all evidence and reasonable inferences are viewed in the light most favorable to Plaintiff, the records shows that a genuine issue of material fact exists as to all of her claims including a genuine issue of material fact as to the pretextual nature of her selection for demotion and termination. As stated, courts may give credence to the evidence favorable to the movant only to the extent that it is "uncontradicted and impeached." *Reeves*, 530 U.S. at 151. Here, the records and statements of Defendant's employees repeatedly contradict themselves sufficient to allow Plaintiff to survive summary judgment and present her case to a jury. Therefore, Defendant's Motion for Summary Judgment should be denied.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests the court deny Defendant's Motion for Summary Judgment as Plaintiff has raised a genuine question of fact to proceed to trial.

Respectfully Submitted,

kennard richard P.C.

_/s/ *Dennis L. Richard*___________
Dennis L. Richard
Texas Bar No. 16842600
Southern District No. 2743749
Dennis.Richard@kennardlaw.com
85 N.E. Loop 410, Suite 603
San Antonio, Texas 78216
Main: (210) 314-5688
Fax: (210) 314-5687

ATTORNEY-IN-CHARGE FOR ILENE HARPER

OF COUNSEL FOR PLAINTIFF
/s/ *A.J. Rodriguez*___________
Arnoldo J. Rodriguez
Texas Bar No. 24083756 / Southern District No. 2330481
85 N.E. Loop 410, Suite 603
San Antonio, Texas 78216
Main: (210) 314-5688 / Fax: (210) 314-5687
AJ.Rodriguez@kennardlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this **20th day of January 2017,** a true and correct copy of the above document was filed with the Court via the Court's CM/ECF system and notification was sent to Defendant as follows:

Cory Rush
Jamie Houston
ROGERS, MORRIS & GROVER, LLP.
5718 Westheimer Rd, Ste. 1200
Houston, TX 77057

_*/s/ A.J. Rodriguez*___
A.J. Rodriguez